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In The
SUPREME COURT OF THE UNITED STATES
October Term 1973

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al.,
Petitioners,

-v-

RONALD BRADLEY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS ALLEN PARK PUBLIC SCHOOLS, ET AL.

OPINIONS AND ORDERS BELOW

The opinions in the Court of Appeals for the Sixth Circuit filed June 12, 1973, are printed in the Appendix to the Petition For Writ Of Certiorari filed by Allen Park Public Schools, et al., in Case No. 73-435, at pages 110a through 240a (Pet. A. 110a-240a)[1] and are reported at 484 F.2d 215 (CA 6, 1973). The judgment of the United States Court of Appeals for the Sixth Circuit entered June 12, 1973, is unreported and appears in the Appendix to the Petition for Writ of Certiorari at pages 244a through 245a. (Pet. A. 244a-245a).

Opinions of the Court of Appeals for the Sixth Circuit rendered at prior stages of the case are reported at 433 F.2d 897 (CA 6, 1970), 438 F.2d 945 (CA 6, 1971) and 468 F.2d 902 (CA 6, 1972), *cert. den.* 409 U.S. 844 (1972).

[1] Citations denoted "Pet. A.___" refer to the single volume Appendix filed with the Petition For Writ Of Certiorari filed by Petitioners Allen Park Public Schools, et al., in Case No. 73-435. Citations denoted "A.___" refer to the volume and page of the five volume single Appendix filed subsequent to the grant of the Petitions For Writ Of Certiorari in Nos. 73-434, 73-435 and 73-436.

The Ruling On Issue Of Segregation, dated September 27, 1971, issued by the District Court for the Eastern District of Michigan is printed in the Appendix to the Petition For Writ Of Certiorari at pages 17a through 39a (Pet. A. 17a-39a) and is reported at 338 F. Supp. 582 (E.D. Mich. 1971).

The Findings of Fact and Conclusions of Law On Detroit-Only Plans of Desegregation, dated March 28, 1972, issued by the District Court, is printed in the Appendix to the Petition For Writ Of Certiorari at pages 53a through 58a (Pet. A. 53a-58a).

The Ruling On Propriety of Considering A Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit, dated March 24, 1972, issued by the District Court, is printed in the Appendix to the Petition For Writ Of Certiorari at pages 48a through 52a (Pet. A. 48a-52a).

The Ruling On Desegregation Area and Order For Development of Plan of Desegregation, dated June 14, 1972, issued by the District Court, is printed at pages 97a-105a in the Appendix to the Petition For Writ Of Certiorari (Pet. A. 97a-105a). The District Court's Findings of Fact and Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plans, also dated June 14, 1972, is printed in the Appendix to the Petition For Writ Of Certiorari at pages 59a through 96a (Pet. A. 59a-96a).

The Order for Acquisition of Transportation, dated July 11, 1972, entered by the District Court, is printed in the Appendix to the Petition For Writ Of Certiorari at pages 106a through 107a (Pet. A. 106a-107a).

The Ruling and Order On Petitions for Intervention entered by the District Court on March 15, 1972, is set forth in the decision of the Court of Appeals for the Sixth Circuit printed in the Appendix to the Petition For Writ Of Certiorari at pages 208a to 209a, footnote 6 (Pet. A. 208a-209a) and at pages 232a to 233a (Pet. A. 232a-233a), respectively, and in the joint Appendix at A. Ia204-207.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 12, 1973. This Petition For Writ Of Certiorari was timely filed on September 6, 1973. Certiorari was granted on November 19, 1973.

STATEMENT OF QUESTIONS PRESENTED

I

ASSUMING, ARGUENDO, A *DE JURE* SEGREGATED PUBLIC SCHOOL SYSTEM IN OPERATION WITHIN THE DETROIT SCHOOL SYSTEM, CAN THE VESTIGES OF SUCH SEGREGATION BE ELIMINATED AND THE DETROIT PUBLIC SCHOOL SYSTEM BE CONVERTED TO A UNITARY SYSTEM UNDER A DESEGREGATION PLAN LIMITED TO SAID SCHOOL DISTRICT?

II

WHERE A *DE JURE* SEGREGATED PUBLIC SCHOOL SYSTEM IS FOUND IN OPERATION IN THE CITY OF DETROIT SCHOOL DISTRICT, DOES THE UNITED STATES CONSTITUTION REQUIRE OR PERMIT A UNITED STATES DISTRICT COURT TO ISSUE A DESEGREGATION ORDER EMBRACING UP TO EIGHTY-FIVE (85) OTHER GEOGRAPHICALLY AND POLITICALLY SEPARATE, IDENTIFIABLE AND UNRELATED SCHOOL DISTRICTS AND REQUIRING THE FORCED REASSIGNMENT AND CROSS-DISTRICT TRANSPORTATION OF HUNDREDS OF THOUSANDS OF CHILDREN, ABSENT (i) ANY CLAIM OR FINDING THAT SUCH OTHER SCHOOL DISTRICTS HAVE FAILED TO OPERATE UNITARY SCHOOL SYSTEMS, AND (ii) ABSENT ANY CLAIM OR FINDING THAT THE BOUNDARY LINES OF ANY SCHOOL DISTRICTS WERE ESTABLISHED WITH THE PURPOSE OF CREATING OR FOSTERING RACIAL SEGREGATION IN THE PUBLIC SCHOOLS?

III

DOES THE FAILURE TO ACCORD PETITIONERS SCHOOL DISTRICTS, AGAINST WHOM RELIEF IS SOUGHT, A MEANINGFUL OPPORTUNITY TO PRESENT EVIDENCE AND BE HEARD ON ALL CONTROLLING ISSUES, INCLUDING THE ISSUE OF SEGREGATION, A "DETROIT-ONLY" PLAN OF DESEGREGATION AND THE PROPRIETY OF A SO-CALLED METROPOLITAN REMEDY TO DESEGREGATE THE DETROIT PUBLIC SCHOOL SYSTEM, DENY PETITIONERS DUE PROCESS OF LAW?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitutional Provisions

United States Constitution, Amendment V:

AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment X:

AMENDMENT X – POWERS RESERVED TO THE STATES

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Michigan Constitution of 1963, Art. 8, §2:

Free public elementary and secondary schools; discrimination.

"Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin."

Michigan Constitution of 1963, Art. 8, §3:

State board of education; duties.

"Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith."

Superintendent of public instruction; appointment, powers, duties.

"The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law."

State board of education; members, nomination, election, term.

"The state board of education shall consist of eight members who shall be nominated by party conventions and elected at large for terms of eight years as prescribed by law. The governor shall fill any vacancy by appointment for the unexpired term. The governor shall be ex-officio a member of the state board of education without the right to vote."

Boards of institutions of higher education, limitation.

"The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section."

Michigan Statutes

Michigan Compiled Laws, § 340.352:

340.352 Body corporate; powers, rights, liabilities; presumptions.

"Sec. 352. Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gifts, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district shall be the successor of any school district previously existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years;

and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law."

Michigan Compiled Laws, §340.355:

340.355 Discrimination; race, color, intellectual progress.

"Sec. 355. No separate school or department shall be kept for any person or persons on account of race or color. This section shall not be construed to prevent the grading of schools according to the intellectual progress of the pupil, to be taught in separate places as may be deemed expedient."

Act 34, Sec. 28, Mich. Pub. Acts of 1867:

"(2271) Sec. 28. All residents of any district shall have an equal right to attend any school therein; *Provided*, That this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient."

Act 48, Sec. 12, Mich. Pub. Acts of 1970:

388.182 Attendance provisions, implementation; conditions.

"Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing or modifying attendance provisions the first class school district boards established under the provisions of this amendatory act shall have a policy of open enrollment and shall enable students to attend a school of preference but providing priority acceptance, insofar as practicable, in cases of insufficient school capacity, to those students desiring to attend the school for participation in vocationally oriented courses or other specialized curriculum."

Act 319, Part II, Ch. 2, Sec. 9, Mich. Pub. Acts of 1927:

> "Sec. 9. All persons residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any person or persons on account of race or color: *Provided*, That this shall not be construed to prevent the grading of schools according to the intellectual progress of the pupil, to be taught in separate places as may be deemed expedient."

STATEMENT OF THE CASE

The Status of Petitioners School Districts In This Litigation

Petitioners are forty-two (42) separate, unrelated and identifiable Michigan school districts in Wayne, Oakland and Macomb counties within varying degrees of geographical proximity to the city of Detroit. Each of Petitioners School Districts is an independent municipal body corporate organized and existing pursuant to the Constitution and laws of the State of Michigan.[2] Each of said school districts is governed by its respective duly elected Board of Education. There is no claim or finding that any of the Petitioners has failed to operate a unitary school system or that any of the Petitioners' school district boundaries were established for the purpose of fostering racial segregation in the public schools. The complaint in this cause asserts no unlawful action respecting Petitioners and makes no claim for relief against Petitioners. Petitioners are before this Court because the United States District Court and the United States Court of Appeals for the Sixth Circuit have decreed that Petitioners can be *used* for the purpose of changing the racial composition of the Detroit public school system from predominantly black to predominantly white.

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[2] Michigan Compiled Laws, Section 340.352.

The Basis of This Litigation

This action was commenced by the filing of a complaint by the plaintiffs on August 18, 1970. (Pet. A. 2a). The defendants named in the complaint are the Governor of the State of Michigan, the Attorney General of the State of Michigan, the Michigan State Board of Education, the Superintendent of Public Instruction for the State of Michigan, the Board of Education of the City of Detroit, and its then members, and the Superintendent of the Detroit Public Schools.

The complaint is directed solely at the operation of the Detroit public school system and alleges that as a result of actions and policies of the Detroit Board of Education and a section of Act No. 48 of the Public Acts of Michigan, 1970, [3] said school system is not being operated on a unitary basis. No claim is made that the Detroit school district was established for the purpose of fostering racial segregation. No claim is made that the establishment or operation of any other school district has any causal connection with the alleged failure to operate the Detroit school system as a unitary system. The gravamen of the complaint is stated in paragraph I thereof as follows:

> "... this being a suit for declaratory judgment declaring certain parts of Act No. 48 of the Michigan Public Acts of 1970 (a copy of which is attached hereto as Exhibit A) unconstitutional. This is also an action for injunctive relief against the enforcement of certain portions of said Act No. 48 and *to require the operation of the Detroit, Michigan public schools on a unitary basis.*" (Pet. A. 2a). [Emphasis added.]

The Complaint alleged that in the 1969-70 school year the overall racial mix of the student population of the Detroit schools was 61.9% Negro, 36.4% white and 1.7% were of other racial ethnic minorities (Pet. A. 6a). It was further alleged that *some* of the schools in the City of Detroit were identifiable as "white"

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[3] Said Act applied only to so-called First Class school districts in the State of Michigan. The City of Detroit School District is the only First Class school district in the State, *Bradley et al.* v. *Milliken et al.*, 433 F2d 897, 900 (CA6, 1970). The effect of one section of the Act was to delay implementation of a proposed plan to effect a more balanced distribution of black and white students in certain Detroit senior high schools (Pet. A. 110a-111a).

schools or as "Negro" schools (Pet. A. 6a), and that –

> "Plaintiffs allege that they are being denied equal educational opportunities by the defendants *because of the segregated pattern of pupil assignments and the racial identifiability of the schools in the Detroit public school system.* Plaintiffs further allege that said denials of equal educational opportunities contravene and abridge their rights as secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States." (Pet. A. 11a). [Emphasis added.]

Plaintiffs further alleged that the Detroit School Board had followed a racially discriminatory policy in assigning faculty and staff members employed in the Detroit school system on the basis of race and color. (Pet. A. 12a).

The concluding paragraph of the complaint reiterates that the matters complained of related solely to the City of Detroit School District:

> "Plaintiffs and those similarly situated and affected on whose behalf this action is brought are suffering irreparable injury and will continue to suffer irreparable injury by reason of the provision of the Act complained of [4] herein and by reason of the failure or refusal of defendants *to operate a unitary school system in the City of Detroit....*" (Pet. A. 12a). [Emphasis added.]

On April 7, 1970, the Detroit Board of Education adopted a plan to effect a more balanced distribution of black and white students in certain senior high schools by changing attendance zones involving some 12,000 pupils, to be carried out over a three year period (Pet. A. 114a-115a). Before this plan could be implemented the Michigan legislature enacted Act No. 48 of the Public Acts of 1970. The principal purpose of said Act was internal reorganization of the management of the Detroit school system. However, the Act delayed implementation of the above-mentioned plan to achieve a more balanced distribution of black and white high school students by providing that –

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[4] Act 48, Public Acts of Michigan, 1970.

"Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board *shall be delayed* pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. . . ." Act No. 48, Section 12, Public Acts of Michigan, 1970; Michigan Compiled Laws Section 388.182. [Emphasis added.]

The relief requested by plaintiffs was the implementation of the Detroit School Board's partial plan of senior high school desegregation adopted on April 7, 1970, the restraining of Section 12 of Act 48, restraining of new school construction, requiring the assignment of faculty and staff to each school in Detroit according to the system-wide racial ratio, and a plan for the operation of the Detroit school system on a non-racial, unitary basis. (Pet. A. 13a-15a).

Before trial on the issues framed by the complaint ever commenced, plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit from denial of plaintiffs' request for a preliminary injunction to require implementation of the Detroit Board of Education's proposed April 7th plan to effect a more balanced ratio of black and white students in certain senior high schools. The Court of Appeals *sua sponte* declared that Section 12 of Act 48 was unconstitutional because it delayed implementation of the Detroit Board of Education plan. *Bradley et al.* v. *Milliken et al*, 433 F2d 897 (CA6, 1970).

Trial on the merits *limited to the issue of segregation within the Detroit public school system* [5] commenced on April 6, 1971, and concluded on July 22, 1971. During the course of said trial, Intervenors Denise Magdowski, et al, moved to join eighty-four (84) school districts in Wayne, Oakland, and Macomb Counties, including Petitioners herein, as parties. (A. Ia119). The District Court never ruled on such motion.

[5] "Ruling On Issue of Segregation" (Pet. A. 18a).

On September 27, 1971, the District Court issued a "Ruling On Issue of Segregation" (Pet. A. 17a) finding "a *de jure* segregated school system *in operation in the City of Detroit*" [6] (Pet. A. 38a).

The District Court stated that the principal causes for the segregation found to exist in Detroit were population movement and housing patterns –

> "...A current condition of segregation exists... The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation..." (Pet. A. 33a).

The District Court concluded, however, that –

> "... both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the City of Detroit...." (Pet. A. 33a)

The acts of the Detroit Board of Education found by the District Court, and affirmed by the Court of Appeals for the Sixth Circuit, to have resulted in the *de jure* segregation of the Detroit school system can be summarized as follows:

1. The Detroit Board's creating and maintaining optional attendance zones in neighborhoods undergoing racial transition in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools. (Pet. A. 24a-27a; 34a-35a; 139a-140a).

2. The Detroit Board's practice of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, within the Detroit school system, which

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[6] Emphasis added.

could have accepted the black pupils. (Pet. A. 35a; 136a-139a).

3. The Detroit Board's creating and altering attendance zones, maintaining and altering grade structures and creating and altering feeder school patterns in a manner which has had the effect of continuing black and white pupils in racially segregated schools within the Detroit school system.[7] (Pet. A. 25a-26a; 35a-36a; 118a-136a).

4. Constructing new schools within the City of Detroit school district in such manner as to contain the black population. (Pet. A. 26a-27a; 144a-151a).

The Court of Appeals for the Sixth Circuit further affirmed the District Court's conclusion that the State of Michigan[8] abetted the *de jure* segregation of the Detroit school system on the grounds that –

1. The acts of the Detroit Board of Education as a subordinate entity of the State government are attributable to the State of Michigan, thus creating a vicarious liability on the part of the State (Pet. A. 151a).

2. The Michigan legislature delayed the implementation of the Detroit Board's April 7, 1970, desegregation plan by the passage of Section 12 of Act 48, Public Acts of Michigan, 1970 (Pet. A. 151a).

3. The effects of the Detroit school system construction program are held to be attributable to the State Board of Education (Pet. A. 151a).

4. The Michigan legislature for many years did not provide

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[7] The District Court noted that simply by drawing boundary lines in an east-west direction the Detroit Board could achieve "significant integration". (Pet. A. 26a).

[8] As noted by the Court of Appeals, however, the State of Michigan is not a party to this litigation (Pet. A. 115a); *Bradley* v. *Milliken*, 484 F.2d 215, 220. (CA 6, 1973).

funds specifically for the transportation of pupils within the Detroit school district (Pet. A. 151a). [9]

5. In 1957 and 1958 some unidentified number of black high school students were transported from a black school district outside Detroit to a high school within Detroit because of inadequate high school facilities (Pet. A. 137a-138a) with the *assumed* approval of the State Board of Education (Pet. A. 152a).

Nowhere in the findings and conclusions issued by the District Court or in the opinion of the Court of Appeals is there any assertion that a single school district, except Detroit, has defaulted in the constitutional obligation to maintain a unitary school system. Nor is there any claim or finding that the establishment or operation of any other school district had any causal connection with the *de jure* segregation found extant in the operation of the Detroit school system.

On November 5, 1971, the District Court ordered the Detroit Board of Education to submit a plan of desegregation for the Detroit schools within sixty (60) days and ordered the State Petitioners to submit a so-called metropolitan plan of desegregation within one-hundred-twenty (120) days (Pet. A. 46a-47a). [10]

The District Court's Order of November 5, 1971, adumbrated a dramatic change in the nature of the proceedings. Despite having conducted a trial limited to the issue of unlawful segregation within the Detroit school system and having made findings limited to such issue, the District Court perceived its remedial powers to be infinite. Some eighty-five (85) independent school districts in Wayne, Oakland and Macomb counties were, and are, suddenly confronted with the prospect of being subjected to judicial fiat

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[9] The State did not provide specific funds for so-called in-city transportation to any of the many city school districts within the State of Michigan (Pet. A. 154a-157a).

[10] Inasmuch as there was, and is, no claim, evidence or finding of "metropolitan" segregation, it is submitted that the District Court erred in ordering the submission of a "metropolitan" plan of desegregation.

without any claim, trial or finding that either their establishment or operation was, or is, tainted by unconstitutional acts. Pursuant to the aforementioned Order of November 5, 1971 (Pet. A. 46a), a so-called metropolitan plan of desegregation was filed with the District Court on or about February 4, 1972.

On February 9th, 16th and 17th, respectively, Grosse Pointe Public Schools, Allen Park Public Schools, et al., Southfield Public Schools and School District of the City of Royal Oak filed motions to intervene for the purpose of representing their interests and those of the parents and children situate in said school districts. (A. Ia185, 189, 192, 196).

On March 15, 1972, the District Court granted said school districts' motions to intervene as a matter of right, and simultaneously imposed the following conditions designed to circumscribe Petitioners School Districts' participation in the proceedings:

"1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.

"2. No intervenor shall reopen any question or issue which has previously been decided by the court.

"3. The participation of the intervenors considered this day shall be subordinate to that of the original parties and previous intervenors.

"4. The new intervenors shall not initiate discovery proceedings except by permission of the court upon application in writing, accompanied by a showing that no present party plans to or is willing to undertake the particular discovery sought and that the particular matter to be discovered is relevant to the current stage of the proceedings.

"5. No new intervenor shall be permitted to seek a delay of any proceeding in this cause; and he shall be bound by the brief and hearing schedule established by the Court's Notice to Counsel, issued March 6, 1972.

"6. New intervenors will not file counterclaims or cross-complaints; nor will they be permitted to seek the joinder of additional parties or the dismissal of present parties, except upon a showing that such action will not result in delay.

"7. *New intervenors are granted intervention for two principal purposes:* (a) *To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan;* (b) *To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this Court.*

"8. New intervenors shall present evidence, if any they have, through witnesses to a number to be set, and limited, if necessary by the court, following conference.

"9. With regard to the examination of witnesses, all new intervenors shall among themselves select one attorney per witness to act for them, unless one or more of the new intervenors show cause otherwise." (Pet. A. 232a-233a; A. Ia 206-207). [Emphasis added.]

Petitioners School Districts filed written objections (A. Ia208, 218, 220) with the District Court to the imposition of such conditions. To date, the District Court has not ruled on said objections.

The District Court precluded Petitioners School Districts from participation in hearings on a Detroit-only plan of desegregation by withholding ruling on the motions for intervention until after said hearing had commenced (Pet. A. 53a) and by express limitation in the order granting intervention:

"7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan

area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court." (Pet. A. 232a; A. Ia. 206).

Upon being granted right to intervene on March 15, 1972, the District Court advised Petitioners School Districts that the Court had previously set March 22, 1972 (A. Ia203-207), as the date for filing of briefs on the legal propriety of a "metropolitan" plan of desegregation and that said School Districts thus had one (1) week to present their legal arguments on such issue. On March 24, 1972, two (2) days after the due date for the filing of briefs, the District Court issued a "Ruling On Propriety Of Considering A Metropolitan Remedy To Accomplish Desegregation Of The Public Schools Of The City Of Detroit" (Pet. A. 48a).

The District Court commenced taking testimony on a "metropolitan" plan of desegregation at 10:10 a.m. on March 28, 1972. About two (2) hours after Petitioners School Districts' counsel had first appeared in the District Court and before completion of testimony of a single witness, the District Judge announced that all counsel could stop by his office and pick up his "Findings Of Fact And Conclusions Of Law On Detroit-Only Plans Of Desegregation" (Pet. A. 53a). Relying upon inapposite cases [11] where a state-wide dual school system was fostered and operated pursuant to state policy, the District Court declared its intention to change the racial composition of the Detroit school system by means of a "metropolitan" plan of desegregation.

During the period from March 28, 1972, to April 14, 1972, the District Court conducted hearings on the so-called metropolitan plan for desegregating the Detroit school system (Pet. A. 59a). Counsel for Petitioners School District was directed by the District Court to confine his participation to "the size and expanse of the metropolitan plan" (A. IVa225-226), which effectively precluded Petitioners from offering any evidence in opposition to such a remedy.

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[11] *Bradley* v. *Richmond*, 338 F. Supp. 67 (E.D. Va. 1972), upon which the District Court placed principal reliance for its "metropolitan" remedy, was reversed by the Court of Appeals for the Fourth Circuit on June 5, 1972, *Bradley* v. *Richmond*, 462 F.2d 1058 (CA 4, 1972), affirmed by an equally divided Court, 412 U.S. 92 (1973).

On June 14, 1972, the District Court issued "Findings Of Fact And Conclusions Of Law In Support Of Ruling On Desegregation Area And Development Of Plans" (Pet. A. 59a) and "Ruling On Desegregation Area And Order For Development Of Plan Of Desegregation" (Pet. A. 97a). In the opening paragraph of the Findings of Fact and Conclusions of Law, the court stated –

> "... *It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation.*" (Pet. A. 59a-60a). [Emphasis added.]

The District Court's Order For Development of Plan of Desegregation is premised on the self-serving assertion that " 'relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city' " (Pet. A. 98a). [12]

The June 14, 1972, Order of the District Court created a panel of nine (9) [13] persons to prepare and submit a so-called metropolitan plan of desegregation. (Pet. A. 99a). Despite the fact that the fifty-two (52) school districts, outside Detroit, who were included in the so-called desegregation area have approximately 503,000 students compared to Detroit's approximately 276,000 students, the District Court directed they should have a single representative on the panel while the Detroit Board of Education was granted three (3) panel members (Pet. A. 99a).

The District Court's command was not to simply desegregate the Detroit public schools but to reassign pupils in order to arrive at a racial balance among the Detroit public schools and the

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[12] As will be more fully dealt with in the argument, such contention exhibits a misapplication of the constitutional command to desegregate segregated schools. The District Court and the Court of Appeals erroneously view racial balancing and desegregation as synonymous.

[13] Subsequently increased by the District Court to eleven (11) people to permit representation on the panel by two (2) teacher organizations.

schools within the fifty-two (52) independent school districts selected by the District Court. While assiduously avoiding the use of the words "racial balance", the overriding objective of the District Court to achieve a racial balance is patently expressed in the following statement:

> "...*pupil reassignments shall be effected* within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation *to the end that, upon implementation, no school, grade or classroom b[e] substantially disproportionate to the overall racial composition...*" (Pet. A. 101a-102a). [Emphasis added.]

Despite having previously found that there was no unlawful segregation of faculty and staff in the Detroit school district (Pet. A. 28a-32a) and having opined that the matter of faculty reassignment was "already litigated" (A. IVa71), "foreclosed" and that the court was "precluded from considering the matter of faculty" (A. IVa73), the court's Order of June 14, 1972, mandates the reassignment of faculty and staff (Pet. A. 102a-103a, para. F.)

On July 11, 1972, the District Court ordered the Detroit Board of Education to purchase at least 295 buses (estimated cost approximately $3,000,000) for the purpose of transporting pupils under a desegregation plan not then *in esse*, and *sua sponte* added the State Treasurer as a party defendant to disburse the necessary monies (Pet. A. 106a).

The Decision of the Court of Appeals

On July 20, 1972, the District Court entered an Order declaring its prior rulings and orders, concerning its findings of *de jure* segregation in Detroit and its rulings on a Detroit-only and a so-called metropolitan plan of desegregation, to be deemed final orders under Rule 54(b) of the Federal Rules of Civil Procedure and certifying the issues presented therein under the provisions of 28 U.S.C. 1292(b). (A. Ia265).

Appeal was taken from the aforementioned orders and on December 8, 1972, the United States Court of Appeals for the Sixth Circuit rendered an opinion, by a panel of three judges, affirming the Ruling On Issue of Segregation (Pet. A. 17a) and

Findings of Fact and Conclusions of Law On "Detroit-Only" Plans of Desegregation (Pet. A. 53a). The decision of the panel vacated the remaining orders appealed from, but affirmed in principle the ruling of the District Court that Petitioners and other school districts could be used as instrumentalities for altering the racial balance in the Detroit school district (Pet. A. 111a-112a).

On January 16, 1973, the Court of Appeals for the Sixth Circuit granted rehearing *in banc* which had the effect of vacating the previous opinion and judgment of the court (Pet. A. 112a). Oral arguments before the court *in banc* were heard on February 8, 1973, and the opinion and judgment of the court issued on June 12, 1973.

By majority decision the Court of Appeals for the Sixth Circuit affirmed the Ruling On Issue of Segregation, dated September 27, 1971, (Pet. A. 17a) and the Findings of Fact and Conclusions of Law On "Detroit-Only" Plans of Desegregation (Pet. A. 53a). The Court of Appeals further affirmed in principle the ruling of the District Court that Petitioners and other school districts may, without any finding of segregative establishment or operation, be included in a remedy (Pet. A. 173a), the principal objective of which is racial balancing.

The Court of Appeals declared that any school district to be affected by the decree of the District Court is a necessary party under Rule 19, Fed. R. Civ. P. (Pet. A. 177a) and as a pre-requisite to implementation of a multi-school district remedy, school districts to be affected must be made a party to the litigation and afforded an opportunity to be heard (Pet. A. 177a).

The Court of Appeals, while holding that affected school districts [14] must be afforded an opportunity to be heard, so circumscribes such right as to render it meaningless. The Court of Appeals states that –

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[14] Subsequent to the filing of the Petition For Writ Of Certiorari herein, Plaintiffs-Respondents filed an amended complaint adding all but one of the more than 86 school districts in Wayne, Oakland and Macomb counties to these proceedings. No claim of unlawful action is made against any of said school districts. The amended complaint alleges their inclusion is necessary to desegregate the Detroit school system (A. Ia296-297).

> "...the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the 'Detroit-only' plans of desegregation, dated March 28, 1972." (Pet. A. 178a).

The net result is that Petitioners and other school districts are foreclosed from any hearing whatever with respect to the controlling issues. The final remedy – a "metropolitan" racial balancing plan – is already ordained. Pursuant to the decision of the Court of Appeals, there remains only the selection of the school districts to be used to effectuate such plan.

Summary

In summary, the salient facts attendant to this litigation may be stated as follows:

1. The singular issue framed by the complaint filed in this case, and the sole issue tried on the merits, is whether the Detroit school system has been *operated* as a *de jure* segregated system.

2. There is no claim, no proofs and no finding that any school district in the State of Michigan was established for the purpose, or with the foreseeable effect, of fostering racial segregation.

3. There is no claim, no proofs and no finding that any of the independent school districts, except the City of Detroit school district, included in a so-called metropolitan remedy have committed any acts of *de jure* segregation individually or by virtue of State action.

4. The separate, unrelated and identifiable school districts intended to be used to effect a change in the racial balance of the Detroit school system have been and are operating unitary school systems.

5. There is no causal connection between the found *operation* of the Detroit school system as a *de jure* segregated

system and the establishment or operation of other separate, unrelated and identifiable school districts in the State of Michigan.

6. The change in the racial composition of the Detroit school system from majority white to majority black in recent years is the result of demographic factors common to large cities throughout the United States.

7. The so-called metropolitan remedy conceived by the District Court, and approved in principle by the Court of Appeals, is a racial balancing scheme having the sole purpose and effect of creating a white majority in all schools within the Detroit school system.

SUMMARY OF ARGUMENT

The Nature of the Constitutional Violations Here Found Requires A Remedy Limited to the Detroit School System

Assuming, *arguendo*, that the Detroit school district is a *de jure operated* school system, the "nature of the violation determines the scope of the remedy". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The nature of the violation found in the instant case is that the Detroit Board of Education, aided and abetted by the action and inaction of State officials, engaged in segregative zoning and student assignment practices within the Detroit school system (Pet. A. 118a), created optional attendance areas (Pet. A. 139a), and pursued building construction and transportation policies (Pet. A. 136a, 144a, 151a), all calculated to assign students, or deny students admission, to particular schools *solely within the Detroit school system* on account of race or color.

The appropriate remedy is one that will "achieve a system of determining admission to the public schools on a non-racial basis". *Brown* v. *Board of Education*, 349 U.S. 294, 300-301 (1955). *("Brown II".)* The District Court has "broad power to fashion a remedy that will assure a unitary school system". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). A unitary school system is one "within which no person is to be effectively excluded from any school because of race or color". *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

The District Court can fashion a remedy which will convert the Detroit school district to a unitary system by requiring the establishment of attendance zones and the transportation of students in such manner that no person will be effectively excluded from any school in the Detroit system because of race or color. While the Detroit school system as a whole would still be composed of a majority of black students, desegregation in the constitutional sense can be accomplished. Compare *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972) and *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972). This Court has stated, in unequivocal terms, that the attainment of a racial balance within a school system is beyond the permissible scope of a desegregation remedy. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971); *Wright* v. *Council of the City of Emporia*, *supra*, at page 465.

The constitutional violations here found do not require or permit a judicial remedy extending beyond the Detroit school district.

The Nature of the Constitutional Violations Here Found Neither Requires Nor Permits A "Metropolitan" Remedy Designed to Effect A Racial Balance Between the Detroit School System and Other Independent School Systems

While school districts in the State of Michigan are instrumentalities of the State subject to ultimate control by the State legislature, education is largely a local function with the day-to-day authority over the management, control and operation of the schools exercised by the local school board. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 52 (1973). The State of Michigan has for over 100 years maintained a policy prohibiting racial segregation in the public schools. *The People* v. *Board of Education of Detroit*, 18 Mich. 399 (1869).

The only constitutional violations found in this case relate to the internal operation of the Detroit school system. No proofs were taken and no findings made with respect to whether any school district was established for the purpose, or with the foreseeable effect, of fostering racial segregation (Pet. A. 60a). No proofs were taken and no findings made with respect to whether any

school district, other than Detroit, has committed any acts of *de jure* segregation (Pet. A. 60a). There is no finding that the establishment of any school district, or the operation of any school district other than Detroit, is causally connected with the acts found to constitute *de jure* segregation in the Detroit school system. With or without the acts of commission and omission by the Detroit Board of Education and the State Petitioners found to constitute *de jure* segregation with respect to the Detroit school system, there is no basis for concluding that the racial composition of the Detroit school system would be any different than it is today.

The Detroit school district boundaries have been coterminous with the boundaries of the City of Detroit by legislative enactments dating back over 130 years to 1842. *The People* v. *Board of Education of Detroit*, 18 Mich. 399,408 (1869). The black population as a total percentage of the population of Detroit has increased at a dramatic rate since 1940, increasing from 9.2% in 1940 to 43.9% in 1970 (Pet. A. 21a). Whatever the root causes for this concentration of blacks in Detroit, there is no evidence that it has been school assignments. *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058, 1066 (CA 4, 1972), *aff'd.* by equally divided Court, 412 U.S. 92 (1973).

The system of local school districts as provided by legislative enactments is unitary in nature and intent. Any racial imbalance between the Detroit school district and other school districts results from an imbalance in the population due to demographic factors. Racially balanced municipalities are beyond the pale of judicial intervention. *Spencer* v. *Kugler*, 326 F. Supp 1235, 1240 (N.J. 1971), *aff'd* 404 U.S. 1027 (1972). The fact that the Detroit school district would be predominantly black even if operated as a unitary system does not provide a federal court with the power to prescribe a remedy designed to effect a more desirable racial balance between Detroit and other school districts.

The majority opinion of the Sixth Circuit Court of Appeals erroneously concludes that a racial imbalance between separate, unrelated and identifable school districts is a constitutional violation (Pet. A. 173a, 224a) without regard to the lack of causal relationship with respect to such imbalance and the actions of school authorities. Absent a showing of a constitutional violation on the part of school authorities, equity does not require a federal court to effect changes in the racial composition of the public

schools. *United States* v. *Board of Education, Independent School District No. 1, Tulsa, Oklahoma*, 459 F.2d 720, 724 (CA 10, 1972); *Davis* v. *School District of the City of Pontiac*, 443 F.2d 573, 575 (CA 6, 1971), *cert. den.* 404 U.S. 913 (1971).

The task is to correct the condition that offends the Constitution. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The issue in this case is not what might be a desirable Detroit school plan, but whether or not there are constitutional violations in the school system as presently operated, and, if so, what relief is necessary to avoid further impairment of constitutional rights. *Bradley* v. *Milliken*, 438 F.2d 945, 946 (CA 6, 1971); *Swann, supra*, at page 23.

The condition that offends the Constitution is not the existence of predominantly white school districts in geographical proximity to the predominantly black Detroit school district. The condition that offends the Constitution is the assignment of pupils *within* the *Detroit* school system on the basis of race or color. Assuming, *arguendo*, that the Detroit Board of Education and State executive officials can be faulted for the racial imbalance in particular schools within the Detroit school system, there is absolutely no basis to support a conclusion that the racial imbalance vis-a-vis Detroit and other school systems is attributable to any action of State or local school authorities.

The effect of the *de jure* segregated operation of the Detroit school system is that, but for the acts complained of, children in the Detroit school system would be attending schools within the Detroit school system having a racial composition more nearly in accord with the racial composition of that school system. Applying the teachings of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971), the appropriate remedy is to prohibit the assignment of children to schools on account of race or color within the Detroit school district, and to remove the vestiges of segregation by re-assigning children in the Detroit school system to schools on a basis which is more nearly reflective of the condition which would prevail had the Detroit school system been operated as a unitary system.

The holding that the Detroit school system can only be desegregated by means of a "metropolitan" remedy ignores the controlling principle that the nature of the constitutional violation determines the scope of the remedy. The Court of Appeals' majority erroneously assumes that desegregation means effecting a racial balance which is predominantly white. The constitutional command to desegregate non-unitary schools does not require or permit racial balancing. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971).

Based upon the pronouncement of this Court that the "nature of the violation determines the scope of the remedy" (*Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, at page 16), the inclusion of separate, unrelated and identifiable school districts in a remedy aimed at altering the racial balance in the Detroit school system must be rejected. A "metropolitan" remedy, on the facts in this case, goes far beyond the nature of the constitutional violation which is expressly limited, by the findings of the District Court, to the *operation* of the Detroit school district as a *de jure* segregated school system.

Petitioners Have Been Denied Due Process Of Law

I.

The Failure of the District Court to Join Petitioners School Districts Is A Denial of Due Process of Law

The remedy invoked in this case would effectively emasculate the extensive right of local control over Petitioners School Districts provided by legislative enactments of the Michigan legislature. For example, said remedy interdicts the exercise of local school district authority over such matters as control of attendance of non-resident students (Mich Const 1963, art VIII, §2; Mich. Compiled Laws 340.582, 340.589); the employment and allocation of teaching and administrative staff to educate resident pupils (Mich. Compiled Laws 340.569); the construction, expansion and use of school facilities (Mich. Compiled Laws 340.77); and the curriculim, activities and standards of conduct and the

safety of students, faculty, staff and parents within each school district (Mich. Complied Laws 340.575, 340.583, 340.614, 340.882).

While the complaint filed in this case made no allegations with respect to Petitioners School Districts, the matter of a "metropolitan" remedy was raised during the course of the trial on the issue of *de jure* segregation within the Detroit school district. At the very outset of the trial on the merits, Plaintiffs-Respondents' counsel stated to the court that a "metropolitan solution" might be appropriate (A. IIa44). On June 17, 1971, intervening defendants Denise Magdowski, et al, filed a formal motion to add Petitioners, and the remaining school districts in Wayne, Oakland and Macomb counties, as parties defendant (A. Ia119-129).

If, as contended by the Sixth Circuit majority, the remedy in this case requires that Petitioners be subjected to the orders of the court, Petitioners are indispensable parties and they should have been included as parties at the commencement of the litigation. *Baltimore & O.R. Co.* v. *Chicago River and Indiana R. Co.*, 170 F.2d 654 (CA 7, 1948), *cert. den.* 336 U.S. 944 (1949); *Bradley* v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E.D. Va. 1972), reversed on other grounds 462 F.2d 1058 (CA 4, 1972), *aff'd.* by equally divided Court, 412 U.S. 92 (1973).

Petitioners were not included in this litigation until after the case was in fact decided. It is, therefore a denial of due process of law to subject them to a judicial remedy which directly affects their lawful interests. *Waterman* v. *The Canal-Louisiana Bank and Trust Company*, 215 U.S. 33, 48 (1909); *Boris* v. *Moore*, 152 F. Supp. 602 (E.D. Wis. 1957), *aff'd.* 253 F.2d 523 (CA 7, 1958). Petitioners had potentially adverse interests to be affected and they were entitled to notice to defend and an opportunity to be heard upon those issues which could affect them, if decided adversely to their interests. *Higgins* v. *Board of Education of the City of Grand Rapids*,___ F. Supp. ___ (W.D. Mich., July 18, 1973), Slip Opinion, page 80.

II.

Restricting Petitioners to A Hearing Only On the Scope of the "Metropolitan" Remedy Is A Denial of Due Process

It is impossible to equate the proceedings in the District

Court with the requirements set forth by this Court as minimal to due process of law. Due process of law requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *In Re Oliver*, 333 U.S. 257 (1948).

The District Court imposed conditions upon Petitioners which limited them to examination of witnesses and the presentation of evidence which accorded with the court's preconceived view that a "metropolitan" remedy was required. The conditions imposed by the District Court effectively precluded Petitioners from raising questions necessary to protect their interests. *Bradley* v. *Milliken*, 484 F.2d 215, 267-268 (CA 6, 1973). (Pet. A. 208a-209a).

The majority opinion of the Sixth Circuit holds that Petitioners, and other school districts to be affected by the decree of the District Court, are "necessary" parties and must be afforded an opportunity to be heard. *Bradley* v. *Milliken*, 484 F.2d 215, 251-252 (CA 6, 1973), (Pet. A. 177a). However, the hearing to be afforded said school districts is meaningless insofar as the protection of their interests is concerned. Under the majority opinion said school districts have *no right* to present evidence or be heard on the issue of segregation or on whether a Detroit-only desegregation plan meets constitutional requirements. *Bradley* v. *Milliken*, *supra*, at page 252 (Pet. A. 178a). The net result is that a "metropolitan" remedy is ordained and Petitioners' right to a hearing is illusory.

The fundamental right to due process of law in the form of a complete and meaningful hearing as a condition precedent to the determination of the scope of a desegregation remedy is exemplified by the holding of this Court in *Keyes* v. *School District No. 1, Denver, Colo.* 413 U.S. 189 (1973). In *Keyes*, *supra*, this Court held that where a single school district was found to have engaged in intentional segregative action but contended that said segregative action affected only a part of the school district, said school district must be afforded the opportunity to prove that the unlawfully segregated area is separate, identifiable and unrelated and should be treated as isolated from the rest of the district.

To permit Petitioners, and other affected school districts, to be heard only in the narrowly restricted sense set forth in the

Sixth Circuit majority opinion is to deny them due process guaranteed by Rule 19, Federal Rules of Civil Procedure and by the Consitution (Amendment V) itself. *Bradley* v. *Milliken*, 484 F.2d 215, 284 (CA 6, 1973). (Pet A. 239a-240a).

ARGUMENT

I

Based Upon the Nature of the Constitutional Violations Here Found, the Remedy Must Be Limited to Converting the Detroit School System to A Unitary School System

This Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) clearly delineated the scope of the powers of federal courts under the mandate of the Court to eliminate racially segregated schools resulting from governmental action and to establish unitary systems at once.

> "... a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. *The task is to correct*, by a balancing of the individual and collective interests, *the condition that offends the Constitution.*
>
> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation.*" *Swann, supra*, at pages 15-16. [Emphasis added.]

In short, the Court stated the perimeters of judicial authority as follows:

> "As with any equity case, *the nature of the violation determines the scope of the remedy.*" *Swann, supra*, at page 16. [Emphasis added.]

The remedy in this case may not go beyond the dimension of the constitutional violations.

The nature of the constitutional violations is that the Detroit Board of Education, aided and abetted by the action and inaction

of State officials, engaged in segregative practices with respect to the operation of the Detroit school system which were calculated to isolate children in certain schools according to race or color.

The constitutional violations found to have been committed *by the Detroit Board of Education* are:

1. Formulating and modifying attendance zones within the Detroit school system to create or perpetuate racial segregation. *Bradley* v. *Milliken*, 484 F. 2d 215, 221 (CA 6, 1973), (Pet. A. 118a).

2. Transporting black children past white schools with available school space. *Bradley* v. *Milliken*, *supra*, at page 221, (Pet. A. 118a).

3. Creating optional attendance areas which permitted white students to transfer to all white or predominantly white schools located nearer the city limits. *Bradley* v. *Milliken*, *supra*, at page 221, (Pet. A. 118a-119a).

4. Constructing schools in either overwhelmingly all black or all white neighborhoods. *Bradley* v. *Milliken*, *supra*, at page 235, (Pet. A. 144a).

The State is found to have contributed to the "segregation found in the Detroit school system", *Bradley* v. *Milliken*, 484 F.2d 215, 242 (CA 6, 1973), (Pet. A. 157a), by the following action, or inaction:

1. The enactment of Act 48 of the Public Acts of 1970, Section 12 of which delayed changes in attendance zones within the Detroit school system [15] pending otherwise constitutional reorganization of the internal management structure of the Detroit school system. The effect of Section 12 of Act 48 was to delay implementation of a De-

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[15] Act 48 applied only to First Class school districts in the State of Michigan. The City of Detroit school district is the only First Class school district in the State. *Bradley* v. *Milliken*, 433 F. 2d 897, 900 (CA 6, 1970).

troit school board plan to effect a more desirable racial balance in some senior high schools in Detroit. *Bradley* v. *Milliken, supra,* at pages 219 and 238, (Pet. A. 114a-115a and 151a). [16]

2. The attaching of vicarious responsibility to the State Board of Education for the segregative results of the school construction program of the Detroit Board of Education. *Bradley* v. *Milliken,* 484 F.2d 215, 238 (CA 6, 1973), (Pet. A. 151a). [17]

3. The State of Michigan did not allocate funds to the Detroit school district for the specific purpose of pupil transportation though such transportation funds were made generally available for students who live over a mile and one-half from their assigned schools in rural Michigan. [18]

4. The assumed "tacit or express" approval of the State Board of Education of the cross-district transportation

[16] Within approximately ninety (90) days of its enactment, the Sixth Circuit Court of Appeals declared Section 12 of Act 48 unconstitutional. *Bradley* v. *Milliken,* 433 F.2d 897, 900 (CA 6, 1970). Said legislative enactment thus had little, if any, impact upon the *de jure* segregation found extant in the operation of the Detroit school system.

[17] Since 1962, the period during which virtually all of the asserted segregative construction occurred, the State Board of Education had no power or authority to approve or disapprove site location. Act No. 175, Public Acts of Michigan, 1962, Michigan Compiled Laws 388.851 et seq. Site selection has always been primarily the subject of local control and since 1962 has been exclusively a matter of local control. Michigan Compiled Laws 340.77.

[18] There is no evidence or finding that the urban-rural classification used as the determinative factor for providing transportation funds was founded upon considerations of race or any purpose or intent to segregate so as to constitute an act of *de jure* segregation. *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189 (1973). Under such classification predominantly white urban schools are also denied transportation funds. In *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 230 (1964) the Court noted that a State could treat school districts differently so long as such disparate treatment is not founded upon the purposeful objective of denying federally protected rights. *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1 (1973) further negates the conclusion that a constitutional violation can be predicated upon the naked existence of a state school financing system which results in unequal revenues between school districts. In *Higgins* v. *Board of Education of the City of Grand Rapids,* ___ F. Supp. ___(W.D. Mich. July 18, 1973), Judge Engel held that said method of allocating transportation funds was not related to racial differences and did not offend the Constitution.

of some high school students in a predominantly black school district to a predominantly black high school in the Detroit school district. *Bradley* v. *Milliken*, 484 F.2d 215, 231-232, 238 (CA 6, 1973), (Pet. A. 137a-138a, 152a).[19]

The effect of the constitutional violations is stated by the majority opinion of the Sixth Circuit as follows:

> "The discriminatory practices on the part of the Detroit School Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found *in the Detroit school system* by the District Judge." *Bradley* v. *Milliken*, 484 F.2d 215, 242 (CA 6, 1973), (Pet. A. 157a). [Emphasis added.]

The nature of the violation is that, as a result of segregative actions with respect to the operation of the Detroit school system, the racial composition of schools *within the Detroit school system* has been contrived by assignment of pupils to schools on the basis of race or color. In short, the Detroit school system is not a unitary system because, *within that system*, persons have been effectively excluded from some schools because of race or color.

There is no evidence and no finding that the constitutional violations found have any causal relationship with the racial composition of the Detroit school system as a whole vis-a-vis the racial composition of Petitioners School Districts, or any other school district. There is no evidence and no finding that Petitioners School Districts have engaged in any action with the purpose or intent to segregate. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

Since the nature of the constitutional violation, and the vestiges thereof, is limited to the perimeters of the Detroit school system, the scope of the remedy must be so limited. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The required objective of the remedy is to see that school

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[19] Said finding is lacking evidentiary support and is premised upon self-serving assumptions. Moreover, the situation referred to was short-lived. In 1960 the predominantly black Carver school district was merged into a predominantly white school district (Pet. A. 169a).

authorities exclude no pupil of a racial minority from any school on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 US 1, 23 (1971).

Plaintiffs-Respondents in this case produced as a witness Dr. Gordon Foster, an expert in the area of school desegregation. Dr. Foster described a racially identifiable school as one that "is disproportionate in racial make-up to the other schools in that system" (A. IVa80). He expressed the opinion that a Detroit school having a student population of 65% black and 35% white would not be a racially identifiable school "in terms of Detroit as a desegregated system where the racial mix is 65-35" (A. IVa81) because such racial composition reflects the total pupil population ratio in the system (A. IVa82).

Dr. Foster stated that a black child in the Detroit school system would not perceive of his school situation being racially isolated or segregated if the pupil composition reflected the racial population in the Detroit school system, because the child would know he had the same situation as all other children in the Detroit school system (A. IVa82-83). Expressed another way, he stated that so long as a child in the Detroit school system is offered the same opportunities offered to all other children in the Detroit school system, the child would not feel racially isolated or contained in a segregated situation (A. IVa84).

Dr. Foster submitted a desegregation plan limited to the Detroit school system which he stated would work *now* (A. IVa76-77), would meet constitutional requirements (A IVa95-95), would eliminate racially identifiable schools (A. IVa97-98), and would improve educational opportunities of Detroit school children (A. IVa98), *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

Dr. Foster's proposed plan and testimony is consonant with the constitutional mandate to convert the Detroit school system to a unitary system in which no child would be effectively excluded from any school because of race or color. *Alexander* v. *Holmes*, *supra*, at page 20; *Swann*, *supra*, at pages 17, 22-23, 28.

The Findings of Fact and Conclusions of Law On Detroit-Only Plans of Desegregation issued by the District Court (Pet. A. 53a-58a) reflect a predisposition to pursue a "metropolitan" area racial balancing scheme to reduce the proportion of black students in the Detroit school district and a disregard for the limitations on the exercise of judicial authority as expressed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

The fact that the Detroit school system has a racial composition approximately 65% black and 35% white does not preclude desegregation of the school system in the constitutional sense by means of a Detroit-only remedy. This Court approved desegregation plans in *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972) and *Raney* v. *Board of Education of the Gould School District*, 391 U.S. 443 (1968), respectively, which resulted in a racial ratio of 66% black and 34% white.

The summary rejection of the Detroit-only plan of desegregation exhibits either a misunderstanding of the mandate that the remedy for a segregated school system is conversion to a unitary system, or a rejection of such mandate in favor of a sociologically-conceived duty to effect a more desirable racial balance between the Detroit school system as a whole and other separate, unrelated and identifiable school districts.

The transition of the Detroit school system to a unitary, nonracial system is the ultimate end to be brought about. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 436 (1968). A unitary school system is one within which no person is to be effectively excluded from any school because of race or color. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). Racial balancing or mixing is not constitutionally required or permitted. *Swann*, *supra*, at page 24.

The only permissible remedy, based on the constitutional violations here found, is to convert the Detroit school system to a unitary system. This can and must be accomplished by a judicial remedy limited to the Detroit school system.[20]

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[20] The District Court noted that simply by drawing boundary lines in an east-west direction the Detroit Board could achieve "significant integration". (Pet. A. 26a).

II

There Is No Constitutional Violation On Which to Predicate A So-Called Metropolitan Remedy

As noted hereinabove, this litigation was instituted, tried, and findings and conclusions issued solely on the grounds that the Detroit school system has been operated as a *de jure* segregated system. The unique posture of this case on appeal is noted at the very outset of the majority opinion of the Court of Appeals for the Sixth Circuit:

> "This is a school desegregation case which, as originally filed, was directed against the school system of Detroit, Michigan, but on this appeal involves both Detroit and school districts located in the surrounding metropolitan area." *Bradley* v. *Milliken*, 484 F.2d 215, 217 (CA 6, 1973). (Pet. A. 111a).

Despite the fact that the only constitutional violations found are limited to the operation of one school district, Detroit, some unspecified number of the 86 unrelated, separate and identifiable school districts [21] in three counties, embracing an area in excess of 1,000 square miles, are faced with the prospect of being subjected to a judicial decree requiring the forced re-assignment of hundreds of thousands of pupils for the purpose of racial balancing.

A.

Brown [22] v. *Board of Education* and Its Progeny, Revisited.

> " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'

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[21] The District Court Ruling On Desegregation Area and Development of Plans (Pet. A. 59a) embraced fifty-three (53) school districts within three counties, covering an area of approximately 700 square miles, and contemplated the transportation of over 300,000 children (Pet. A. 72a).

[22] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) ("*Brown I*"), and *Brown* v. *Board of Education*, 349 U.S. 294 (1955) ("*Brown II*").

" 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

" 'The question is,' said Humpty Dumpty, 'which is to be the master – that's all.' " Lewis Carroll, *Through The Looking Glass.*

The terms "segregation" and "desegregation" have been given well-defined meaning by this Court in relation to the protection of constitutional rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Segregation and desegregation may be, and are, used rhetorically in expressing differing sociological viewpoints but their judicially-prescribed meaning does not permit a court to ascribe its own definition to said terms as the linchpin for a judicial remedy. It is submitted that the District Court and the majority of the Court of Appeals for the Sixth Circuit have distorted the meaning of these terms, as laid down by this Court, in decreeing that a "metropolitan" remedy is required to desegregate the Detroit school system.

A proper assessment of the principle enunciated in *Brown I*, 347 U.S. 483 (1954), begins with *Dred Scott* v. *Sanford*, 60 U.S. (19 How) 393 (1856). In *Dred Scott, supra*, Chief Justice Taney stated that the Constitution of the United States did not afford to black citizens the same rights as afforded to white citizens because black citizens were inferior according to law. Subsequently, the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution recognized that there was no justification whatever for attaching a badge of legal inferiority to black citizens and declared that the sanction of law could not be used to deny to black citizens the same rights afforded to whites. However, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), a majority of the Court gave approval to the "separate but equal doctrine" in holding that a state statute requiring racial segregation in railway service did not amount to a denial of equal protection of the laws. The separate but equal doctrine was then used by some states as justification for legally enforced segregation of pupils in the public schools on the basis of race or color.

In 1954 came *Brown I*, 347 U.S. 483 (1954). This case, and its companion cases from South Carolina, Virginia and Delaware, presented a situation where black children had been denied admission to schools attended by white children under state laws requiring or permitting segregation according to race. The Court concluded that where the State has undertaken to provide free public education, it must be made "available to all on equal terms", *Brown I, supra,* at page 493.

The rationale of the Court was that a state sanctioned policy of racial segregation in fact embodies a legal philosophy premised on inequality between blacks and whites. The Court expressed its agreement with the Kansas District Court that –

> "... Segregation *with the sanction of law*, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Brown I, supra,* at page 494. [Emphasis added.]

Thus, *Brown I*, 347 U.S. 483 (1954), stands for the principle that a state and its agencies may not, in effect, hang signs on the school house door that say "for whites only" or "for blacks only". As stated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6 (1971) –

> "That was what *Brown* v. *Board of Education* was all about."

There is nothing in *Brown I*, 347 U.S. 483 (1954), which says that a preponderance of black students in a particular school, or a particular school district, offends the Constitution. What is condemned in *Brown I* is not the presence of too many or too few black students in a school but use of the force of law to deny black children entrance to a school or classroom solely because of race or color.

In *Brown* v. *Board of Education*, 349 U.S. 294 (1955) ("*Brown II*"), the Court addressed itself to the matter of relief to be accorded where it is found that the state or its agencies have denied black children access to schools on the basis of race. The

Court did not set down with particularity the incidents of the remedial action to be taken but stated as follows:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. *These cases* call for the exercise of these traditional attributes of equity power." *Brown II, supra,* at page 300. [Emphasis added.]

The guidelines for remedial action in *Brown II, supra,* must be applied in the context of the situation presented by the cases to which the Court referred, i.e., a dual school system which separated children in the public schools on the basis of race, by sanction of law. The Court's statement does not grant federal courts unlimited license without regard to the context in which remedial authority is to be exercised. Nor was the Court authorizing racial balancing as a remedy. The objective of the exercise of the courts' equity powers was clearly stated as follows:

> "... At stake is the personal interest of the plaintiffs in *admission to public schools* as soon as practicable *on a nondiscriminatory basis.*" *Brown II,* 349 U.S. 294 (1955), at page 300. [Emphasis added.]

In *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964), a county closed its public school system, under authority of state law, in an attempt to evade the mandate of *Brown I,* 347 U.S. 483 (1954). The Court expressly noted that the Equal Protection Clause relates to equal protection of the laws *"between persons as such rather than between areas", Griffin, supra,* at 230, and that the State could properly treat one county school district different than another so long as such treatment was not founded upon the purposeful objective of denying federally-protected rights. Expressing its dissatisfaction with the efforts of the Prince Edward County school authorities to circumvent the interdiction of *Brown I, supra,* the Court declared that the time for converting to a unitary system with "mere deliberate speed" had run out and that such phrase, used in *Brown I, supra,* could no longer be used as a basis for failure to convert to a unitary school system.

In *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the Court determined that a so-called "freedom of choice" plan did not meet the requirement to convert a dual school system to a unitary school system when, in fact, schools that were formerly all black by sanction of law remained all black.

The New Kent County school system was initially established and maintained under compulsion of the Virginia constitution and statutory provisions mandating racial segregation in the public schools. In 1965 the school board adopted a "freedom of choice" plan whereby each pupil, except those entering the first and eighth grades, could elect to attend either of the two schools in the school system, one of which had been exclusively for whites and the other exclusively for blacks. Three years after the plan went into operation, not a single white child had chosen to attend the all black school.

The Court held that when school authorities have in effect erected signs on the school house doors saying "this school for whites only" or "this school for blacks only", merely removing the signs does not satisfy the obligation to convert to a unitary school system. The affirmative duty of the school authorities to convert to a unitary system, rather than place such burden on the children and their parents, was expressed as an obligation of the school board to formulate a plan to convert to a system "without a 'white' school and a 'Negro' school, but just schools". *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442 (1968).

The command to convert to a system without a white school and a Negro school, but just schools, was not an expression of a requirement for racial balancing. The effectiveness of a desegregation plan is not to be measured in terms of racial balance but in terms of its prospects for dismantling a system of separate schools for blacks and whites.

> "... Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for *dismantling the state-imposed dual system* 'at the earliest practicable date', then the plan may be said to provide effective relief." *Green, supra*, at page 439. [Emphasis added.]

Following its decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the Court in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), in considering the desegregation of segregated schools in Mississippi, said:

> "... continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court *the obligation* of every school district *is to terminate dual systems at once* and to *operate* now and hereafter only *unitary schools.*" *Alexander* v. *Holmes, supra*, at page 20. [Emphasis added.]

The Court defined a unitary system as one –

> "... within which no person is to be effectively excluded from any school because of race or color." *Alexander* v. *Holmes, supra*, at page 20.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5, 6 (1971), the Court noted the reasons for its grant of *certiorari*, as follows:

> "We granted certiorari in this case to review important issues as to *the duties of school authorities* and *the scope of powers of federal courts* under this Court's mandates to eliminate *racially separate public schools* established and maintained by state action. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*).
>
> "This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about." [Emphasis added.]

The Court in *Swann, supra*, expressly noted that –

> "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not

with the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds. *The target of the cases from Brown I to the present was the dual school system." Swann, supra,* at page 22. [Emphasis added.]

Segregation in the public schools in the context of the decisions of this Court means the deliberate separation of white and black children solely on the basis of race, by governmental action. That is the evil struck down by *Brown I* and its progeny and that is the violation to be corrected by judicial remedy. As stated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971):

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; *it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." Swann, supra,* at page 23. [Emphasis added.]

The Court expressed the predicate for judicial action and the limitations on the scope of the remedial powers of the federal courts as follows:

". . . *The task is to correct,* by a balancing of the individual and collective interests, *the condition that offends the Constitution.*

"In seeking to define even in broad and general terms how far this remedial power extends *it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.* Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

"School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should

> have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, *the nature of the violation determines the scope of the remedy*. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion *a remedy that will assure a unitary school system.*" *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). [Emphasis added.]

The Court expressly stated that racial balancing or mixing is neither required nor permitted to satisfy the mandate of the Equal Protection Clause.

> "... If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971).

While the cases presented to this Court from *Brown I*, 347 U.S. 483 (1954) to *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), dealt with situations where there had been a long history of legally structured separate schools for whites and blacks, *Spencer* v. *Kugler*, 326 F. Supp. 1235 (N.J. 1971), *aff'd.* 404 U.S. 1027 (1972), involved a state where, like Michigan, there is no history of state-wide imposed segregation in the public schools. The decision of the three judge court in *Spencer* v. *Kugler, supra*, affirmed by this Court, noted as follows:

> "... *Brown* never required anything more than a unitary school system ...." *Spencer* v. *Kugler, supra*, at page 1241.
>
> ***
>
> "The Court in *Swann* draws a *critical distinction* between those states which have a history of dual school

systems and a separation of the races . . . and those wherein so-called *'de facto'* segregation results from housing patterns and conventional drawing of school district zones."

***

"The creation of those school districts by approval of the legislature on September 18, 1953, preceded the historic decision of *Brown I*, decided on May 17, 1954. The obvious intent of the legislature was to maintain a unitary school system as *Brown I* later required. *While the result of such legislation some 18 years later may be racial imbalance, within certain school districts, it does not amount to segregation.*"

***

"A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention. . . ." *Spencer* v. *Kugler, supra*, at pages 1242-1243. [Emphasis added].

In *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972), and *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484 (1972), the Court addressed itself to the "narrow question" of whether a new school district could be carved out of an existing school district which was in the process of dismantling a dual school system pursuant to court order. The Court held that a new school district may not be created where its effect would be to impede the process of dismantling a dual system. *Emporia, supra*, at page 465.

In *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, ___(1973), 37L. Ed. 2d 548, 563 (1973), the Court held that where a statutory dual school system never existed, the underpinning to support a finding of *de jure* segregation is "purpose or intent to segregate". The Court further held that even within a single school district a system-wide desegregation remedy is not required if the school district can prove that its intentional segregative acts were confined to an area of the school district which is a

separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district.

From *Brown I* to *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973), it is clear that –

1. *De jure* segregation in the public schools means the separation of children in schools solely on the basis of race or color by intentional action of state authorities.
2. The mere existence of racial imbalance in the public schools does not offend the Constitution.
3. Desegregation means the assignment of children to public schools, and within such schools, without regard to their race or color.
4. A unitary school system is a system in which no person is effectively excluded from any school because of race or color.
5. Racial balancing is not required in remedying even a dual school system.

Applying the teachings of this Court from *Brown I* to date, a so-called metropolitan plan of desegregation to accomplish desegregation of the public schools of the City of Detroit is impermissible.

B.

There Is No Constitutional Violation On Which A "Metropolitan" Remedy Can Be Predicated

In *Brown I*, 347 U.S. 483 (1954), the Court declared that where a State has undertaken to provide free public education, it must be made available to all on equal terms. The constitutional and statutory law of the State of Michigan has mandated such policy for over 100 years. Public Act No. 34, Section 28, of the Michigan Public Acts of 1867 expressly provided that –

> "All residents of any district shall have an equal right to attend any school therein . . ."

In *The People* v. *Board of Education of Detroit*, 18 Mich. 399 (1869), the Michigan Supreme Court held that under said statute children could not be denied admission to any school on the basis of race or color.

In 1927 the Michigan legislature enacted Act No. 319, Part II, Chapter 2, Section 9 of which provided as follows:

> "All persons residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any person or persons on account of race or color . . ."

The Michigan School Code of 1955 provides that–

> "No separate school or department shall be kept for any person or persons on account of race or color." Mich. Comp. Laws §340.355.

The long-established State policy against racial separation in the public schools was reaffirmed in the Michigan Constitution of 1963:

> ". . . Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." Mich Const 1963, art VIII, §2.[23]

There is no contention and no finding that the State of Michigan has fostered dual school systems. The only finding of constitutional violation is that within the Detroit school system children have not been assigned to schools without regard to race or color. In *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 752 (CA 5, 1971), the court articulated the basis for treating separate school districts as one for purposes of desegregation, as follows:

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[23] "The anti-discrimination clause is placed in this section as a declaration which leaves no doubt as to where Michigan stands on this question." State of Michigan Constitutional Convention, 1961, *Official Record*, Volume II, page 3395.

> "... historically separate school districts, *where shown to be created as a part of a state-wide dual system or to have cooperated together in the maintenance of such a system,* have been treated as one for purposes of desegregation." [Emphasis added.]

Here, the absence of a State policy fostering a dual school system, the complete absence of cooperative action between Detroit and other school districts with respect to the *de jure* segregated operation of the Detroit school system, and the lack of any causal relationship with respect to the segregation found in Detroit and other school districts prohibits a multi-school district remedy under the guise of desegregating the Detroit school system.

The apparent reasoning used by the majority opinion of the Court of Appeals to support a multi-school district remedy is that (i) all school districts are agencies of the State, and (ii) *de jure* segregation with respect to any school district is, accordingly, State action, ergo (iii) any school districts operating under the egis of State authority may be included in a desegregation remedy. This erroneous postulate is contrary to the pronouncement of this Court that the *nature* of the violation determines the scope of the remedy, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), and ignores the fact that school districts in the State of Michigan, though created by legislative enactment, have plenary authority over the matter of pupil assignments and that the operation of said school districts is largely a local function. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 52-53 (1973).

The Michigan Constitution provides that –

> "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." Mich Const 1963, art VIII, §2.

Pursuant to said constitutional mandate, a school district as established by legislative enactment is an independent "body corporate".

"Sec. 352. Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its corporate limits, by purchase, gifts, grant, devise or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district shall be the successor of any school district previously existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law." Michigan Compiled Laws 340.352.

Illustrative of the broad authority which the legislature has vested in a local school district are the powers to:

1. Acquire real and personal property. Mich. Comp. Laws §§ 340.26; 340.77; 340.113; 340.165; 340.192; 340.352.

2. Hire and contract with duly qualified teachers. Mich. Comp. Laws § 340.569.

3. Determine the length of the school term. Mich. Comp. Laws § 340.575.

4. Control the admission of non-resident pupils. Mich. Comp. Laws § 340.582.

5. Determine course of study and carry on such grades, schools and departments as it shall deem necessary. Mich. Comp. Laws § 340.583.

6. Establish attendance areas within its districts. Mich. Comp. Laws § 340.589.

7. Arrange for transportation of non-resident students. Mich. Comp. Laws § 340.591.

8. Acquire transportation equipment. Mich. Comp. Laws § 340.594.

9. Employ legal counsel. Mich. Comp. Laws § 340.609.

10. Make rules and regulations relative to the public schools of the district. Mich. Comp. Laws § 340.614.

11. Levy authorized millage. Mich. Comp. Laws § 340.643a.

12. Acquire property by eminent domain. Mich. Comp. Laws § 340.711.

13. Approve and select textbooks. Mich. Comp. Laws § 340.882.

In characterizing the nature of local school districts and their extensive control over education, the Michigan Supreme Court noted in *Jones* v. *Grand Ledge Public Schools*, 349 Mich. 1, 5; 84 N.W.2d 327, 329 (1957), as follows:

> "... The general policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by *local State agencies organized with plenary powers* independent of the local government with which, by location and geographical boundaries, they are necessarily closely associated and to a greater or less extent authorized to co-operate. Education belongs to the State. It is no part of the local self-government inherent in the township or municipality except so far as the legislature may choose to make it such. ***The general school laws were carefully planned and enacted to guard that distinction; *provision was made for organization of the common school districts, with officers elected at school meetings by electors with defined qualifications, and who as a school board were given large plenary powers and control of school matters,*

practically independent from the local government of municipalities in which the schools were situated." [Emphasis added.]

See also *MacQueen* v. *City Commission of City of Port Huron*, 194 Mich. 328, 160 N.W. 627 (1916); *School District of the City of Lansing* v. *State Board of Education*, 367 Mich. 591, 116 N.W. 2d 866 (1962).

Here, as noted in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 52 n.108, (1973)–

"... It cannot be seriously doubted that ... education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned."

The majority opinion of the Sixth Circuit ordaining a "metropolitan" remedy, and the order of the District Court, is founded on the premise that a predominantly black school district geographically surrounded by separate, unrelated and identifiable predominantly white school districts offends the Constitution.

"... a remedial order of a court of equity which left the Detroit school system overwhelmingly black (for the foreseeable future) surrounded by suburban school systems overwhelmingly white cannot correct the constitutional violations herein found." *Bradley* v. *Milliken*, 484 F.2d 215, 250 (CA 6, 1973), (Pet. A. 173a). [24]

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"... A large metropolitan area such as we have in our case cannot be made the subject of instant integration. We must bear in mind that the task we are called upon to perform is a social one, which society has been unable to accomplish. In reality our courts are called upon, in these

[24] In the opinion of the three-judge panel initially issued in this case on December 8, 1972, and vacated by granting of rehearing *in banc*, the same concept was expressed as "big city school systems for blacks surrounded by suburban school systems for whites cannot represent equal protection under the law." *Bradley* v. *Milliken*, 484 F.2d 215, 261, 276 (CA 6, 1973), (Pet. A. 195a, 224a).

school cases, to attain a social goal, through the education system, by using the law as a lever." United States District Court, E.D. Mich (Pet. A. 40a-41a).

Obsessed with the notion that racial imbalance between school districts should not be tolerated, the majority opinion of the Court of Appeals states that –

> "If school boundary lines cannot be changed for an unconstitutional purpose, it follows logically that existing boundary lines cannot be frozen for an unconstitutional purpose." *Bradley* v. *Milliken*, 484 F.2d 215, 250 (CA 6, 1973), Pet. A. 174a).

In light of the fact that there have been no proofs taken in this case with respect to the establishment of the boundaries *of any school district*, nor on the issue of whether, with the exclusion of the Detroit school system, any school district has committed acts of *de jure* segregation (Pet. A. 60a), the conclusion that school district boundaries have been frozen for an unconstitutional purpose is incredible. There is no constitutional requirement to change school district boundaries for the purpose of making adjustments of the racial composition of student bodies where, as here, there is no showing that school authorities or other agencies of the State deliberately established or altered such school district boundaries with the purpose of affecting the racial composition of said school districts. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971); *Spencer* v. *Kugler*, 326 F. Supp 1235 (N.J. 1971), *aff'd.* 404 U.S. 1027 (1972).

The statement in the majority opinion of the Sixth Circuit that the instant case calls up haunting memories of the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and that a "metropolitan" remedy is necessary to comply with the mandate of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), is naught but rhetoric. *Bradley* v. *Milliken*, 484 F.2d 215, 249 (CA 6, 1973), (Pet. A. 172a). There is no evidence in this case that any school district, including Detroit, has, with the sanction of law, maintained separate schools exclusively for blacks and exclusively for whites. *Brown I*, *supra*, did not declare that racial imbalance offends the Constitution. The command of *Brown I*, *supra*, was not directed at the racial composition of school

districts but at a deliberate governmental policy of maintaining two sets of schools in a single school system solely on the basis of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 6 (1971).

The implicit rationale for a "metropolitan" remedy is that black students must be confined to a numerical minority in every "school, grade or classroom" (Pet. A. 101a) because a predominance of black children in a school system constitutes invidious discrimination against black children. A "metropolitan" remedy implies that majority black schools are by judicial definition inferior and is in effect a return to the spirit of *Dred Scott* v. *Sanford*, 60 U.S. (19 How) 393 (1856). See opinion of Judge Sobeloff in *Brunson* v. *Board of Trustees of School District No. 1, Clarendon County, S.C.*, 429 F. 2d 820 (CA 4, 1970).

The limitation expressed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), that the "nature of the violation determines the scope of the remedy" makes a "metropolitan" remedy impermissible in this case. The Court of Appeals for the Sixth Circuit recognized the extent of this limitation in *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 63 (CA 6, 1966), *cert. den.* 389 U.S. 847 (1967):

> "... If the school officials, through overt practice or by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must *take affirmative action to remedy the condition which they have caused.*"

The nature of the constitutional violation is that within the Detroit school system children have been assigned to schools on the basis of race or color. The result of such segregative action is that some schools within the Detroit system are comprised of a majority of black or white children in substantial disproportion to the racial composition of that school system.

Had none of the acts found to constitute *de jure* segregation, with respect to the Detroit school system, occurred, no pupil resident in Detroit would have been assigned to any other school district or vice-versa. There is no evidence and no finding that the racial imbalance between Detroit and other school districts is a condition caused by the *de jure* segregated operation of the Detroit school system. Nor is there any finding that any of the separate, unrelated and identifiable school districts, other than the

Detroit school district, are in any way responsible for the *de jure* segregation within the Detroit school system. There is no constitutional violation on which to predicate a "metropolitan" remedy.

The obvious intent of the Michigan legislature has been, and is, to maintain a unitary school system as required by *Brown I*, 347 U.S. 483 (1954), and subsequent decisions of this Court. This intent has been carried out except within the Detroit school system. To uphold a "metropolitan" remedy requires disobedience to the principles enunciated by this Court from *Brown I, supra*, to date. The use of a "metropolitan" remedy to effect a racial balance is clearly proscribed by the holding in *Spencer* v. *Kugler*, 326 F. Supp. 1235, 1243 (N.J. 1971), *aff'd* 404 U.S. 1027 (1972), that –

> "A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention."

See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971).

This litigation was commenced, tried and findings issued on the sole grounds that one school district, Detroit, was being operated in violation of the Constitution. A "metropolitan" remedy using other separate, unrelated and identifiable unitary school systems to effect a racial balance is beyond the scope of this litigation,

> ". . . for there is no right to racial balance within even a single school district, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 24, 91 S Ct. 1267, but only a right to attend a unitary school system." *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058, 1069 (CA 4, 1972), *aff'd* by an equally divided Court, 412 U.S. 92 (1973).

III

Petitioners Have Been And Will Continue To Be Denied Due Process of Law Under the Decision Below

A "metropolitan" remedy directly affects the lives of hundreds of thousands of children and parents within Petitioners

School Districts and requires the expenditure of untold millions of dollars. The remedy invoked in this case would effectively emasculate the extensive right of local control over Petitioners School Districts provided by legislative enactments. For example, said remedy interdicts the exercise of local school district authority over such matters as control of attendance of nonresident students (Mich Const 1963, art VIII, § 2; Mich. Comp. Laws 340.582); the employment and allocation of teaching and administrative staff to educate resident pupils (Mich. Comp. Laws 340.569); the construction, expansion and use of school facilities (Mich. Comp. Laws 340.77); and the curriculum, activities and standards of conduct and the safety of students, faculty, staff and parents within each school district (Mich. Comp. Laws 340.575, 340.583, 340.614, 340.882).

A.

Failure to Join School Districts Whose Interests Are to Be Affected Is A Denial of Due Process

An indispensable party is defined as one whose interest in the subject matter of the suit and in the *relief sought* is so bound up with that of the other parties that his legal presence as a party to the proceeding is an absolute necessity without which the court cannot proceed. *Baltimore & O.R. Co.* v. *Chicago River and Indiana R. Co.*, 170 F.2d 654 (CA 7, 1948), *cert. den.* 336 U.S. 944 (1949).

Petitioners School Districts whose interests are directly affected by the remedy decreed in this case were, and are, indispensable parties to this litigation. As such, Petitioners were entitled to be made parties *before* the district court decided the case. *Waterman* v. *The Canal-Louisiana Bank and Trust Company*, 215 U.S. 33, 48 (1909); *Bradley* v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E.D. Va. 1972), reversed on other grounds 462 F.2d 1058 (CA 4, 1972), *aff'd* by an equally divided Court 412 U.S. 92 (1973).

A formal motion to add the Petitioners, and other school districts, was filed with the District Court on July 17, 1971 (A. Ia 119). The court did not rule on this motion, but discussed it in the September 27, 1971, "Ruling On Issue of Segregation" (Pet. A. 17) and concluded that the motion should not be considered at that time because "in considering the motion to add the listed school districts we pause to note that the proposed action has to

do with relief." (Pet. A. 38a). This Court under similar circumstances, stated:

> "There is another class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court, *it will require them to be made parties,* if within its jurisdiction, *before deciding the case.*" *Waterman* v. *The Canal-Louisiana Bank and Trust Company,* 215 U.S. 33, 48-49 (1909). [Emphasis added.]

While the failure to join an indispensable party does not deprive the court of jurisdiction to determine the pending action before it, it does prohibit the court from granting any relief which would affect an absent party.

> "If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons." *Waterman* v. *The Canal-Louisiana Bank and Trust Company,* 215 U.S. 33, 49 (1909).

Petitioners are indispensable parties in litigation involving the continued existence and basic functions of such school districts. Yet Petitioners were not included as parties to this action at the commencement of proceedings. Nor were they joined as parties as requested by intervenors Denise Magdowski, et al, in July of 1971. It was not until the closing weeks of the two-year old lawsuit that Petitioners on their own motion (A. Ia 192), over the objection of Plaintiffs-Respondents, were permitted "conditional" participation in the proceedings (A. Ia204).

In *Higgins* v. *Board of Education of the City of Grand Rapids,* ___ F. Supp___ (W.D. Mich. 1973), Judge Engel granted a motion to join school districts in a similar situation, saying:

> ". . .Although the precise issue had not been decided, general concepts of due process strongly suggested that if the suburban school districts had potentially adverse interests to be affected, they were entitled to notice to defend and an opportunity to be heard upon those issues which could affect

them, if decided adversely to their interests. Accordingly, the court ordered the joinder." Slip Opinion, page 80.

As stated by Judge Weick in dissenting from the majority opinion below:

> "All school districts whose borders were being invaded were entitled as a matter of right and not of mere grace, to be made parties defendent in the case and to be accorded the same rights as any other defendants. They were entitled to be heard on all issues in the case which affected them, and were entitled to participate effectively in the proceedings. They were entitled to be heard on the issues of segregation, the 'Detroit-Only plan' and the 'Metropolitan plan'." *Bradley* v. *Milliken*, 484 F.2d 215, 267 (CA 6, 1973), (Pet. A. 206a).

Petitioners have been denied due process of law by the District Court's failure to join them as parties, and any relief decreed in this suit must be shaped in a manner that will not affect Petitioners' interests.

B.

Petitioners "Conditional" Intervention and the Proceedings Thereafter Constitute A Denial of Due Process of Law

Seven days after allowing Petitioners to intervene, as a matter of right but subject to oppressive conditions,[25] the trial court required the filing of written briefs on the legal propriety of a metropolitan plan of desegregation. (A. Ia203). The court did not require or permit oral argument. Less than thirty-six (36) hours later the court issued its "Ruling On Propriety of Considering A Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit" (Pet. A. 48) rejecting the contentions of Petitioners. Testimony regarding "metropolitan" plans commenced four days later (a weekend and Motion day falling between) at 10:10 a.m. Prior to the noon recess, just two hours after Petitioners' counsel had first appeared in the District Court and before completion of testimony of a single witness, the District Judge announced that counsel could stop by his office and pick up his "Findings of Fact and Conclusions of Law on Detroit-

[25] Petitioners submit that the conditions imposed by the trial court on their participation (A. Ia206-Ia207) in themselves constitute a denial of due process requiring reversal. See "Objections to Conditions Placed On Intervenors", (A. Ia209) and (A. Ia220).

Only Plans of Desegregation" (Pet. A. 53a) wherein the court declared its intention to seek a more desirable racial mix by means of a "metropolitan" plan.

Thus, without any opportunity for oral argument, without opportunity to examine or cross-examine one witness, without opportunity to present one shred of evidence, and, indeed, without opportunity to obtain copies of previous pleadings and testimony, the Petitioners had been effectively foreclosed from protecting their interests. Permitting Petitioners a limited hearing on the scope of the remedy after issues affecting their interests had been decided adversely thereto does not accord with the principles of due process as enunciated by this Court:

> "A fundamental requirement of due process is 'the opportunity to be heard' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

> "A person's right to a reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony,[26] and to be represented by counsel." *In Re Oliver*, 333 U.S. 257, 273 (1948).

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938).

> "We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins* v. *McKeithen*, 395 U.S. 411, 428 (1969).

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[26] See trial court's ruling quashing the subpoena to Wells (A. IVa 278); refusal to receive the deposition of Dr. David Armor (A. IVa 283). Indicative of the trial court's differing treatment of Petitioners as opposed to other parties in receiving evidence is the court's ruling on Exhibit 16. After counsel for Petitioners established that the witness had no personal knowledge as to Exhibit 16 the court decided to "follow Justice of the Peace Cane's rule: 'We will let it in for what it's worth.' " (A. IVa 197). Yet Mr. Wells' testimony regarding safety in the schools was excluded as not relevant despite previous testimony (A. IVa 212-213) on the same subject.

It is impossible to equate the proceedings below with the requirements set forth by this Court as minimal to due process of law.

Allowing counsel to examine or cross-examine witnesses after the witnesses' views have been adopted by the court can hardly be considered due process, or even worthwhile.

The consequences of the trial court's actions were clearly foretold by Mr. Justice Fortas in *In Re Gault*, 387 U.S. 1, 19-21 (1967):

> "*Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.* Due process of law is the primary and indispensable foundation of individual freedom. *** As Mr. Justice Frankfurter has said: 'The history of American Freedom is, in no small measure, the history of procedure.' But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.' " [Emphasis added.]

Judge Miller, dissenting below, set forth the fundamental requirements of due process in relation to this case:

> "Parties to be affected and against whom relief is sought should be accorded, in compliance with basic principles of due process, an opportunity to be heard at a meaningful time and in a meaningful manner not only with respect to the ultimate scope of the remedy to be fashioned, but also with respect to important, significant and perhaps even controlling issues, including the issue of segregation, a 'Detroit-only' school plan and the propriety of a metropolitan remedy. If any one of these issues is resolved in favor of parties outside

> the Detroit School District, the nature and scope of a remedy embracing outlying districts would not be reached. Hence the outlying districts have a vital interest in each issue separately and should be heard on each in a true adversary sense. Until this is done our expression of view on the merits of the several questions is uncalled for and ill-advised. *To permit these additional parties to be heard only in the restricted sense set forth in the majority opinion is to deny them basic rights guaranteed* not only by Rule 19, Federal Rules of Civil Procedure, but *by the Constitution itself." Bradley* v. *Milliken,* 484 F.2d 215, 284 (CA 6, 1973), (Pet. A. 239a-240a). [Emphasis added.]

Minimal requirements of due process require that Petitioners be afforded a meaningful hearing on all issues in this litigation which could affect them if decided adversely to their interests.

CONCLUSION

The constitutional violation here found is the *de jure* segregated operation of one school district, the City of Detroit. The objective, therefore, is to redress this constitutional evil. Thus, the remedy is limited to one which will convert the Detroit school system to a unitary system wherein no person is effectively excluded from any school within the Detroit school system because of race or color. This objective does not permit the extension of the remedy beyond the Detroit school district.

As noted by Mr. Justice Powell in his separate opinion in *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189, ___, 37 L.Ed.2d 548, 580 (1973), nothing in the Constitution commands or encourages the court-compelled disruption of public education, [27] and the serious economic burdens, [28] inherent in the forced re-assignment and large scale transportation of hundreds of thousands of school children, which the "metropolitan" remedy decreed in this case commands.

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[27] See Findings of Fact and Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plans (Pet. A. 59a-96a).

[28] As an example, the annual operating costs for merely transporting the 310,000 pupils to be re-assigned under the District Court's ruling (Pet. A. 72a, para. 43), if accomplished at the conjectural cost referred to by the District Court, would range from $15,500,000 to $18,600,000. (Pet. A. 73a, para. 45).

Moreover, there is no substantial evidence that a "metropolitan" remedy would result in any educational benefit for either black or white students.[29] Indeed, social science findings have revealed that the educational benefits historically assumed to derive from racial balancing are greatly exaggerated. *On Equality of Educational Opportunity*, Frederick Mosteller and Daniel P. Moynihan, page 31, Random House 1972; "The Evidence On Busing", David J. Armor, *The Public Interest*, No. 28 (Summer 1972); "Do Schools Make A Difference", Godfrey Hodgson, *The Atlantic*, March 1973, pages 35-46. Dr. James Coleman, who headed the team of social scientists commissioned to prepare the report on "Equality of Educational Opportunity" for the United States Office of Education, has stated that –

> ". . .There is not sufficient evidence to show that the kind of benefits to lower-class children that arise from a socio-economically heterogeneous or racially heterogeneous school can't also be provided by other means. I don't think a judge can say there is prima facie evidence of inequality in educational opportunity on achievement grounds if there is school segregation. In this sense, I think judges have looked at that study [30] and used the results more strongly than the results warrant." "Coleman On the Coleman Report", *Educational Researcher*, American Educational Research Association, Vol. 1, No. 3 (March 1972).

The "metropolitan" remedy decreed by the Sixth Circuit Court of Appeals goes far beyond the affirmative constitutional duty to desegregate the Detroit school system. Said remedy presumes a constitutional duty to maximize integration among school districts. The majority opinion of the Court of Appeals creates, by judicial legerdemain, a new constitutional standard, to wit: desegregation of a non-unitary school system requires racial balance not merely within the offending school system but among separate, unrelated and identifiable unitary school systems within such geogra-

[29] Dr. Gordon Foster, the expert witness for Plaintiffs-Respondents, whose concept of a "metropolitan" plan was adopted by the District Court (Pet. A. 69a, para. 32), testified that "quality of education" was not a criteria for said plan (Pet. A. IVa255). The District Court rejected proffered evidence relative to the questionable educational benefit of a "metropolitan" remedy as irrelevant (Pet. A. IVa283-284).

[30] The Coleman report on "Equality of Educational Opportunity", Office of Education, U.S. Department of Health, Education and Welfare, U.S. Government Printing Office, 1966. OE-38001; Superintendent of Documents Catalog No. FS5-238:38001.

phical area as the court deems relevant. Such an extension of constitutional doctrine is not required to satisfy the guarantee of the Equal Protection Clause and is interdicted by the decisions of this Court. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, 31-32 (1971).

In *United States* v. *Board of Education, Independent School District No. 1, Tulsa, Okla.*, 459 F.2d 720, 724 (CA 10, 1972), the court stated that the validity of desegregation plans –

> ". . .should not depend on the whim or preferences of members of the federal judiciary. They must be judged by constitutional standards. . ."

Racial imbalance as a societal evil is simply beyond the scope of this litigation. As stated in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, at page 22.

> "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds. . . One vehicle can carry only a limited amount of baggage."

In accord with the principles heretofore enunciated by this Court, the "metropolitan" remedy commanded by the decisions of the courts below is impermissible.

Petitioners School Districts request that this Court reverse the judgment of the Court of Appeals for the Sixth Circuit with respect to a "metropolitan" remedy and dismiss Petitioners from this litigation.

Respectfully submitted,

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